and including September 24, 1921, a like list of accounts was delivered to Ratner accompanied in each instance by a letter substantially in the form of the letter delivered with the September list (fol. 183):

> "Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23rd, 1921."

The assignment embraced

> "all sums of money, accounts and demands due and owing to us on our books of account, and such moneys, accounts and demands that will become due and owing to us, including our books of account, which may accrue and become due to us in the future in the ordinary course of business."

On the strength of this continuing collateral Ratner advanced a total of $30,000, as shown by his cancelled vouchers, $15,000 being lent as late as July 1st, 1921.

On September 17, 1921, Mr. Ratner learned that certain of the creditors had become dissatisfied and were pressing for payment of past due accounts. "I did not know then and certainly did not believe in the least that the company was insolvent, feeling simply that, like all businesses in times of depression it was having difficulty because of the more or less unreasonable pressure by one creditor or another" (fols. 184-6).

> "I felt that I was entitled to and I demanded the protection which by agreement had been given to me, and in reliance upon which I had advanced the $30,000. I so expressed

myself to the officers of the company on September 17, 1921, and it was agreed that I should receive the checks tha would thereafter come in in connection with its accounts receivable. Thereafter, and until the appointment of the Receiver, I did receive the checks, trade acceptances and notes which came in from customers who appeared upon the books of the Hub Carpet Company as debtors, and whose names appeared on the lists delivered to me, these obligations being turned over to me in precisely the form in which they were received, and so far as I know, constituted all the obligations received by the company following my demand on September 17th" (fols. 186-187).

The total so collected during the following ten days, and preceding the filing of the petition in bankruptcy against the Hub Carpet Co. on September 26th, was $11,581.78.

The assignment provided further (fols. 32-33):

"We, the Hub Carpet Company, further covenant and agree to fully disclose our business and financial conditions at any time the said Aaron Ratner so demands and hereby authorize him to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued.

"We further covenant and agree with the said Aaron Ratner on demand to turn over to the said Aaron Ratner any and all payments made to us by our debtors and to be applied by him in payment of any obligations due him, notwithstanding that the time for the payment of said obligations held by him at that time had not in fact become due and payable."

Mr. Ratner moved for an order requiring the receiver to turn over to him the proceeds of collections of assigned accounts until the total of the advance of $30,000, with interest, would be repaid. The motion was granted in the District Court, followed by unanimous affirmance in the Circuit Court of Appeals. Attention is respectfully drawn to the thoughtful opinions of both Courts, the holding in each instance being rested on two grounds, viz: (a) that the New York rule which declares a mortgage of chattels invalid where the right of disposal is reserved in the mortgagor, is predicated on physical possession of the tangible property which thus gives rise to reputed ownership, and has no application to intangibles; and (b) that the respondent having taken possession of the receivables, so far as they were capable of possession, some ten days before the appointment of the receiver, the lien which he thereby "fastened" became complete and enforceable.

The question stated:

Where, more than four months before a petition in bankruptcy is filed, an assignment is made in good faith of present and future business accounts as they accrue, as security for the repayment of advances thereupon made, a full statement of these accounts being rendered regularly each month to the assignee, does the consent of the latter that the assignor may continue to collect and use the accounts until he demands that they be turned over to him render the entire transaction invalid, even where such demand is made

and he actually takes over the accounts and begins their collection prior to the filing of a petition in bankruptcy and the appointment of a receiver?

POINT I.

Ostensible ownership arising from physical possession is the basis of the rule which obtains in some states, including New York, that a reserved right of disposal in a mortgage avoids the pledge of tangible property.

The rules which distinguish between tangible and intangible personal property run markedly through the Common Law and Statutes of England and America; and neither by reason nor authority can the language of the cases cited by petitioner, all of which deal with tangible property, be held to apply to the other.

The fallacy of petitioner's argument is that because mortgages of goods and chattels containing a reserved power of disposal are in the State of New York declared invalid, despite recording, it follows that the invalidity arises from some doctrine other than that of reputed ownership and applies to pledges of property incapable of physical possession as well as that capable thereof.

Petitioner closes his eyes completely to the classifications of personal property which in England marked the very earliest conceptions of property

in things, and which rested in the very nature of the property. The primitive method of acquiring anything was by occupancy or possession. Grants or gifts of chattels personal were at first possible only by actual possession. The rule requiring actual delivery of possession remained long unchanged except that, where goods could not be physically transferred because of bulk, or the like, delivery of the means of reducing to possession, such as keys to warehouse, bills of lading, etc., was permitted (*Ryall* v. *Rowles*, 1 Vesey Senior [1749], p. 362). The conception of a right or chose in action as apart from the thing itself came much later. The transfer of this right, at first prohibited "because thought to be a great encouragement to litigiousness," was later cognizable only in equity by way of declaration of trust in the assignor, in whose name alone the assignee was permitted to bring suit (Bl. Comm., Book 2, Ch. XXV., pp. 388, 397, 441-2).

Thus the law, distinguishing between chattels personal which on the one hand were capable of physical possession, and on the other were not so capable (which for brevity we may term respectively tangible and intangible), developed one set of rules for the one class and another set of rules for the other, just as definitely as it distinguished real property from personal. This distinction has been maintained to the present day, and in many states, including New York, we find it expressed in the interpretation of the phrase "goods and chattels" occurring in the chattel mortgage recording acts:

"The words 'goods and chattels' do not include choses in action, but only personal property which is visible, tangible and movable. (*Booth* v. *Kehoe*, 71 N. Y. 341; *State Trust Company* v. *Casino Company*, 13 App. Div. 344; *Haskins* v. *Kelly*, 24 N. Y. Super. Ct. 170; *Bacon* v. *Bonham*, 27 N. J. Eq. 212; *Kilbourne* v. *Fay*, 29 Ohio St. 264; *Marsh* v. *Woodbury*, 1 *Metc.* 436.)"

National Hudson Bank v. *Chaskin*, 28 App. Div. 315.

See also,

Niles v. *Mathusa*, 162 N. Y. 546;
Sexton v. *Kessler*, 225 U. S. 90;
Re Michigan Furniture Co., 249 Fed. 974.

By the continued use of this phrase in the recording acts, legislatures have expressed the intention that this distinction continue.

Assuming the governing doctrine to be other than that of reputed ownership, it does not at all follow that it applies equally to all classes of personal property, and that the distinctions developed and observed through these centuries at once disappear. It is not too much to expect that, before acceding to the obliteration of these distinctions, petitioner's counsel refer us to a single court of pertinent jurisdiction which shares or even intimates his view. We speak of courts of pertinent jurisdiction because even as to chattels capable of physical possession many important states are opposed to the New York rule that the reservation of the power of disposal renders the mortgage void as a matter of law (5 *Amer. & Eng. Encyc. of Law*, 2d ed., pp. 992 and 993). Every case cited

by petitioner here as opposed to the holdings of the courts below, directly involves chattels capable of ostensible ownership, and the general language of these cases, though separated from the context, still remains language applicable only to that class of goods and chattels. The only exception is the *Leslie-Judge* case, which involved the question of the pledge of good will as well as of chattels. Since good-will is an intangible which cannot exist except as part of and related to the tangibles of a business, it was held that the reserved right to dispose of the tangibles made the mortgage void as to both, since they were inseparable, under the rule that where part of a transaction is declared void for fraud (actual or presumed), the whole transaction must fall.

In re Volence, 197 Fed. Rep. 232;
In re Leslie-Judge, 272 Fed. Rep. 886.

Historically, mere failure to change possession at first rendered the transaction void; the rigor of this rule gradually was relaxed, but never it seems to the extent of validating a transaction where both possession *and* the right of disposal were reserved. The recording acts, dealing with possession only, clearly did not validate a transaction where also the right of disposal was reserved. And the cases so hold.

"Men get credit by what they apparently own and possess" is a notable summary of the true basis of the doctrine, enunciated by this Court in the first case before it which directly involved the effect of reserved power of disposal by the mortgagor of chattels (*Robinson* v. *Elliott*, 22 Wall. 525). This Court

observed that the precise question had "never before been presented" to it, and that "The cases cannot be reconciled by any process of reasoning or on any principles of law." Thereupon it proceeded to place its decision squarely upon the doctrine in question in language that leaves little room for the illusory theory which petitioner offers:

> "Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion."
>
> *Robinson* v. *Elliott*, 22 Wall. 525.

And the New York rule with regard to the reserved right of disposal, however general the language of some of the cases may be, rests also on this doctrine of ostensible ownership:

> "There would be no hope of maintaining honesty and fair dealing, if the courts should allow a mortgagee or vendee to succeed in a claim to personal property against creditors and purchasers, after he had not only left the property in the possession of the debtor, but had allowed him to deal with and dispose of it as his own."
>
> *Griswold* v. *Sheldon*, 4 N. Y. 581, 590.

Even the briefest of reference to early English decisions shows ostensible ownership, and nothing else, to be the origin of the rule there, as it is here. Probably the earliest definite declaration of the rule and the principle upon which it is based occurs in *Twyne's* case (Coke, Part III, 80-b), decided in 1601, and cited in *Robinson* v. *Elliott.* One Pierce, indebted to Twyne and others, transferred to Twyne his personal property, including sheep, in satisfaction of a debt, but nevertheless continued in possession of the property, "used them as his own," and in due time "shore the sheep and marked them with his own mark." The Court of Star Chamber declared that

> "the donor continued in possession *and used them as his own* and that *by reason thereof,* traded and trafficked with others and defrauded and deceived them."

Later the doctrine was enacted into statute (1623; 21st James I., Ch. XIX), which, as a practice at which it expressly aimed and prohibited, recited a precise definition of the doctrine of reputed ownership:

> "(5) And for that it often falls out, that many Persons before they become Bankrupts, do convey their Goods to other Men upon good consideration, *yet still keep the same,* and are reputed the Owners thereof, *and dispose the same as their own,"*

following which is the declaration that such property shall be seized and sold for the benefit of the creditors of the person in possession.

Ever since the *Twyne* case and this statute, the courts have consistently, as far as we have been able to discover, refused to enforce a sale or mortgage where both possession *and* the right of disposal were reserved by the owner, solely and clearly on the doctrine of apparent or reputed ownership.

The history of chattel mortgages in England was similar to that of sales; in time the rule relaxed so that the retention of possession in case of mortgage, just as in the case of sale, constituted only evidence of fraud rather than its absolute badge (*Martindale* v. *Booth*, 3 Bainewall & Adol. 498). In his work on chattel mortgages Mr. Jones observes (Section 379):

> "Prior to the enactment of laws for registering mortgages of personal property, the retention of possession by the mortgagor, like the retention of possession by the vendor after absolute sale, was either presumptive or conclusive evidence of fraud. This rule was designed to prevent a person from acquiring a false credit on the strength of the possession and apparent ownership of property which he had sold or mortgaged. This was the doctrine of the courts and not a declaration of statute."

See also

Randall v. *Cook*, 17 Wend. 53.

The recording acts dealt only with the question of possession, and completely removed from its continuance the stigma which had theretofore attached; but not so with the reserved right of disposal. That remained as much a "fraud" in the eyes of the law, after the recording acts, as it had

been unchangingly from the time of *Twyne's* case. And this Court points that out specifically in *Robinson* v. *Elliott, supra* (p. 521):

> "It is true the law conferred on the parties the right to agree that the possession of the property could remain with the mortgagor, provided the mortgage be recorded; but if the mortgage contains other provisions, which, on legal principles, vitiates the whole instrument, it is difficult to see how recording it could make it even prima facie valid. The Bill of Sales Registration Act in England makes void all bills of sale not filed as required, if unaccompanied by possession. An eminent writer in speaking of this act says:
>
> " 'Of course, the mere fact of due registration of a bill of sale, under this act, does not necessarily make it good against creditors. The act was not passed with a view of making good a title which was not good before, but for the protection of creditors.' "

See also

Wood v. *Lowry,* 17 Wend. 492.

It is clear that the rule set forth in the cases cited by petitioner is directly traceable to the *Twyne* case, the *Statute of James,* and the many decisions which followed. It is based expressly upon the doctrine of reputed ownership arising from the physical possession of goods and chattels and the right of the possessor to deal with them as his own. The rule has always been limited to "goods and chattels"; and neither in reason, nor historically, does it apply to the intangible right called a chose in action.

Such is the express holding of this Court:

Greey vs. *Dockendorff*, 231 U. S. 513.
Sexton v. *Kessler*, 225 U. S. 90.

And such is the specific statement (quoted at page 14 of this brief) of the New York Appellate Division in a case where the facts were strikingly similar.

Stackhouse v. *Holden*, 66 App. Div. 423.

POINT II.

The decisions of Federal and State Courts sustain the validity of the instrument under review.

Sexton v. *Kessler*, 225 U. S. 90;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Stackhouse v. *Holden*, 66 (N. Y.) A. D. 423;
Sexton v. *Kessler*, 172 Fed. Rep. 535.

In *Stackhouse* v. *Holden*, *supra*, accounts were assigned as collateral security for the obligations of the assignor, and by the very terms of the written agreement the assignor was authorized to collect these accounts and use the proceeds as he saw fit. The assignment was upheld. In doing so, the Appellate Division in a single paragraph disposes completely of the argument which the petitioner makes in the case at bar:

> "The rule pertaining to a change of possession of goods and chattels upon a sale thereof, or to the filing of a lien thereon, and the dominion required to be exercised by a purchaser, mortgagee or pledgee of tangible property, cannot be applied to a sale or pledge of indebtedness, intangible in itself, only the evidence of which if in writing is perceptible; the conditions are not the same, and the rules of law applicable to transfers of the two classes of property differ; as to one, the possession of which is evidence of ownership, the dealings must be open, visible and public, while as to the other the business may be, as it usually is, private. The necessities of business require it. Aside from the provision of the Bankrupt Law prohibiting preferences, and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit, and any attempt to apply fixed rules for the transaction of the business would interfere with this undoubted right."
>
> *Stackhouse* v. *Holden, supra,* at p. 427.

Petitioner concedes that this case is directly in point. We respectfully submit it is the law.

In *Sexton* v. *Kessler, supra,* the bankrupt set aside certain securities for the defendant, reserving the right to use some of them from time to time and to substitute others in their place. Withdrawals and substitutions were made. Possession of the original and substituted securities was retained by the bankrupt until fourteen days before the filing of a petition in bankruptcy. At that time possession was delivered to the defendant, who

knew that pledgor was insolvent. The agreement was unanimously declared by this Court to be a valid assignment.

While there may be an inconsequential difference in detail between the Sexton case and the case at bar, not one argument made here by the petitioner was omitted in that appeal; and Judge Holmes summarized for the Court in the following language the whole point of appellant's contention in that case, as well as petitioner's in this, as follows (p. 97):

> "So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or at least one that is to be preferred to the claim of the trustee. * * *
>
> "The most obvious objection is that the continued physical power of the New York firm over the securities and its right to withdraw and substitute admittedly reserved are inconsistent with a title or lien of the English house in any form."

In upholding the transaction this court brushed aside the objection thus stated as well as the objection that the actual delivery of the securities to defendant occurred immediately prior to the bankruptcy and therefore was presumptively fraudulent (p. 99).

> "When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York and in the absence of any controlling statute to the contrary such we understand to be what the law should be. *Parshall* v. *Eggert*, 54 N. Y. 18; *National Bank of Deposit* v. *Rogers*, 166 N. Y. 380."

We have, too, the case of *Chapman* v. *Hunt*, 254 Fed. Rep. 535. There the bankrupt assigned by way of collateral security its outstanding *accounts receivable* under written agreement by which the bankrupt was to collect the accounts and use the proceeds in its business upon assigning to the defendant an equal amount of new accounts. This course was pursued for almost a year and a half. The bankrupt proceeded with the collection of the assigned accounts, used the proceeds in its business, and assigned new accounts from time to time. There was furnished to Hunt monthly a list of assigned accounts stamped with a notice of assignment.

The agreement with Hunt was carried out until April 16, 1916, when he was given a new list of receivables. Two days later he arranged that the candy company take up all his notes, advanced the money with which to do so, a total of $8,000, and as collateral security therefor received assignments of accounts, some of which were new and some of which had theretofore already been assigned to him in the amout of $1,998.62, or $3,002.18 in all. Hunt knew at this time, or had reasonable cause to believe, "that the candy works was insolvent." Less than a month later an involuntary petition in bankruptcy was filed against the candy works and an adjudication followed.

The Circuit Court of Appeals unanimously upheld the transaction, declared that the Court below was in error in holding that the transaction of April, 1916, "was an entirely new

and independent one, constituting a transfer within four months of the filing of the petition," that Hunt's knowledge in April, 1916, of the company's insolvency "did not make the agreement of January 13, 1915, invalid," and required the trustee to account to Hunt.

POINT III.

The taking possession of the assigned accounts prior to the filing of the petition in bankruptcy perfected the lien thereon of the assignee, and the rights of the subsequently appointed Receiver and Trustee became subject thereto.

The moment accounts came into the ownership of the Hub Carpet Company the original agreement operated "* * * by way of present contract to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into ownership of the party."

McCaffrey v. *Woodin*, 65 N. Y., p. 463.

See also

Greey vs. *Dockendorff*, 231 U. S. 513.
National Bank v. *Rogers*, 166 N. Y. 390;
Kribbs v. *Alford*, 120 N. Y. 524;
Union Trust v. *Bulkeley*, 150 Fed. Rep. 510;
Boise v. *Talcott*, 212 Fed. Rep. 268;
Barnes v. *Alexander*, 232 U. S. 117.

As was said in the last cited case:

> "It is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired, will make the contractor a trustee as soon as he gets title to the thing."

Justice Holmes of this Court makes the same point in his decision in *Greey* v. *Dockendorff*, supra, in the following language (p. 516):

> "The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *N. Y.*, 6 N. Y. 179."

The lists of accounts delivered monthly by the company to Mr. Ratner with the letter of transmittal, which in each instance referred to them as "accounts receivable assigned to you in accordance with our agreement of May 23, 1921," identified the accounts embraced in the assignment and set them aside and placed them as completely in his possession as the nature of the property permitted. Indeed, beginning September 17, pursuant to the demand of Mr. Ratner under the terms of his agreement of May 23, 1921, all checks and payments were turned over to him in the form in which they were received; and this continued to the time of the delivery of the September 23rd list, and thereafter until the filing of the petition in bankruptcy. Whatever may be argued as to Mr. Ratner's rights in other circumstances, it must be clear that as to the accounts collected by him prior to such filing, and as to those included in the September 23rd list, his rights be-

came so fixed and perfected that, until satisfied, these accounts were withdrawn from the estate to which the trustee later became entitled.

It is the settled rule in New York that a pledgee or lienee perfects his rights by the act of so taking possession:

> " * * * as soon as that act has intervened, the lien of the creditor becomes perfect, and in the absence of statutory regulations prevails over the lien of subsequent executions."
>
> *McCaffrey* v. *Woodin*, 65 N. Y., p. 463.

See also

Greey vs. *Dockendorff*, 231 U. S. 513;
Wilds v. *Bd. Education*, 227 N. Y., p. 217;
Gregory v. *Morris*, 96 U. S. 619;
Union Trust Co. v. *Bulkeley*, 150 Fed. Rep. 510;
Sexton v. *Kessler*, 225 U. S. 90;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Young v. *Upson*, 115 Fed. Rep. 192;
Bailey v. *Baker Ice Machine Co.*, 239 U. S., at pp. 275-276.

The last cited case, directly supporting the point, is outlined in the opinion of the Circuit Court of Appeals herein, and seems to be decisive.

The following from the Circuit Court of Appeals, Second Circuit, is equally pertinent:

> "Doubtless a court of equity would not interevene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor; but no such assistance would have been needed, the mortgagor having vol-

untarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagee. *Hauselt* v. *Harrison*, 105 U. S. 401, 26 L. Ed. 1075; *Wood* v. *U. S. Fidelity Co.* (D. C.), 143 Fed. 424."

Sexton v. *Kessler*, 172 Fed. Rep., at p. 538.

There would seem to be little room for argument left on this point after reading the opinion of Mr. Justice Holmes in the *Greey* case, *supra*, in which he points out that the delivery to the assignee of accounts assigned under a general agreement perfects the equitable lien created by that agreement, and that the rights of the assignee cannot be disturbed where between the receipt of the accounts by the assignor and their delivery to the assignee no condition intervened such as attachment, and the like. This exactly describes the conditions surrounding the case at bar.

POINT IV.

The good faith of the transaction is not open to question.

The Court below declares (pp. 99-100, transcript of record):

"There is nothing in this record to warrant even a suggestion of fraud. The loan by Mr. Ratner and the assignment of Hub Carpet Co. of the accounts receivable, constituted a legitimate and businesslike transaction whereby

> a considerate father was willing to help his son and the latter's associates in maintaining what, at the time, seemed to be a hopeful business. The questions involved, therefore, are solely questions of law."

The District Court also disposed of the matter as one of law.

The petitioner, having thus treated the matter from the outset, is hardly in a position now to impugn the *bona fides* of the transaction, and the very testimony as to secrecy which he quotes in that regard is but a paraphrase of what the Courts have themselves pointed out as constituting the inherent difference in dealings with tangibles and intangibles:

> "In regard to the secrecy of the lien, it may be observed that every pledge of securities may be and generally is done in secret. Dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be so used to procure credit or capital."
>
> *Stackhouse* v. *Holden,* 66 A. D., p. 426.

> "The public was not giving credit to the New York house on the strength of its apparent ownership of these securities because it knew nothing at all about them. The *visible possession* of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors. Yet ownership of chattels where there has been no change of possession will be protected if they are set apart and marked and in this way notice is given to the public. *First National Bank* v.

> *Pennsylvania Trust Co.*, 124 Fed. 968, 60 C. C. A. 100. *There was, however, as to the securities under consideration, no secrecy which was not inherent in their nature. The public does not know what stocks, bonds, or notes a merchant has, and therefore does not give him credit because of them.*"
>
> *Sexton* v. *Kessler*, 172 Fed. Rep. at 539.

Further on this point is the language of Justice Holmes in the *Greey* case, *supra* (p. 516):

> "It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors (Williams v. Ingersoll, 89 N. Y. 508, 522), and merely keeping silence to the latter, whether known or unknown, created no estoppel (Wiser v. Lawler, 189 U. S. 260, 270, 47 E. ed. 802, 809, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630; Ackerman v. True, 175 N. Y. 353, 363, 67 N. E. 629)."

The four-month rule does not apply, for the cases expressly hold that the various deliveries of the receivables lists, and the taking over of the accounts, relate back to the date of the original agreement, May 23, 1921; and petitioner does not contend otherwise.

> *Sexton* v. *Kessler*, 225 U. S. at p. 99;
> *Idem*, 175 Fed. Rep. p. 539;
> *Chapman* v. *Hunt*, 254 Fed. Rep. 768.

POINT V.

No question of public interest is involved; dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be used to procure credit or capital.

This is the very view expressed by the Appellate Division of New York in the *Stackhouse* case, quoted above. It is supported by the observations of the Circuit Court of Appeals in this case:

> "It is a matter of common knowledge that the merchant utilizes his accounts receivable and other kinds of choses in action to keep his business liquid and everyone expects that he may sell or pledge such choses in action for that very purpose."
>
> Folio 312, transcript of record.

The common practice of utilizing accounts receivable has long ago been met by the equally common practice on the part of credit departments to demand a statement of assets pledged as well as of assets and liabilities generally.

Petitioner is fearful of the disastrous effect of holding valid such an instrument as involved in this case. This court rejected a similar argument even in connection with chattel mortgages (*Etherbridge* v. *Sperry,* 139 U. S. at pp. 277-278):

> "Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards in-

creased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought, whether the rulings made by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. * * * Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right, or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking of possession by a creditor results in closing the business, and turning the debtor out of employment. * * * The fact that fraudulent relations are possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one unaffected by any settled law of the State, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith, and that the decision of the Supreme Court of Iowa rests on sound principles."

It has been the declared law in this state (New York) at least since 1901 (when the *Stackhouse* case was decided), that assignments of accounts receivable made under circumstances and for pur-

poses similar to those in the case at bar, are valid and enforceable. Apparently, business has been transacted for these many years on that basis, without complaint. The decision of the Court below rather than affecting "most seriously the whole commercial credit system of the country," as petitioner contends, continues it on the principles on which it has been established and on conditions under which it has thrived.

This court has theretofore clearly expressed its views that transactions such as took place between the respondent and bankrupt are valid and enforceable. Petitioner's arguments have been heard by two learned courts, each of which, after careful consideration, had unanimously rejected them. To permit the petitioner further to press the matter would, we respectfully submit, work an injustice upon the creditors of the bankrupt and a needless expense to the estate.

CONCLUSION.

The law is settled in respondent's favor and the petition should be denied.

All of which is respectfully submited.

New York, May 25th, 1922.

LOUIS S. POSNER,
Solicitor and Counsel for Respondent.